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No. 97-1012

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

VIRGINIA STATE CORPORATION COMMISSION,
Petitioner,

TEXAS OFFICE OF PUBLIC UTILITY COUNSEL,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS

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1. Congress Did Not Intend to Override § 2(b).

Respondents' Briefs in Opposition and Petitioners' Petition for Writ of Certiorari ("Petition") agree that the first item to be resolved by the Court is whether Congress intended federal regulation to supersede state law.[1] See FCC Opp. at 8, Bell Opp. at 5-6, and APCC Opp. at 10, n.10. The Court has already chosen to review Iowa Utilities Board v. Federal Communications Comm'n, 120 F.3d 753 (8th Cir. 1997), amended in part on rehearing (Oct. 14, 1997), cert. granted, sub nom. AT&T v. Iowa Utilities Board, 118 S. Ct. 879 (Jan. 26, 1998) (Nos. 97-826 et al.) ("Iowa") wherein the Federal Communications Commission ("FCC") urges that Congress, in passing the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 codified at 47 U.S.C. §§ 151 et seq. (1996) ("the 1996 Act"),[2] intended to alter the 47 U.S.C. § 152(b) ("§ 2(b)") jurisdictional "fence" protecting state authority over intrastate telecommunications from Federal encroachment. Determining Congress' intended scope of the FCC's telecommunications jurisdiction versus that of the states has been deemed too important in Iowa not to be resolved by the nation's highest court. Reconciling the § 2(b) fence to 47 U.S.C. § 276 ("§ 276") of the 1996 Act is no less important than reconciling it to 47

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[1] Briefs in Opposition were filed by the Federal Respondents (the Federal Communications Commission and U.S. Department of Justice); by four of the regional Bell holding companies; and by the American Public Communications Council. For simplicity, this Reply will hereafter refer to them collectively as Briefs in Opposition or individually as "FCC Opp.," "Bell Opp.," or "APCC Opp.", respectively.

[2] All citations to the 1996 Act will be to the Act as codified in the United States Code.

U.S.C. §§ 251 and 252 ("§§ 251 and 252"), and indeed will involve the same principles of statutory construction.

Respondents would prefer that § 2(b) be glossed over as if Congress had written it out of the 1996 Act. Their Briefs in Opposition did not and could not refute that, pursuant to Louisiana Public Service Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 106 S. Ct. 1890 (1986) ("La. PSC"), when Congress chose to supersede § 2(b) in 1990 and 1993 by granting the FCC exclusive authority over intrastate rates for telephone relay services and for mobile services, it did so in a direct, unambiguous manner. See, Petition at 15-17. Congress' use of explicit language in one part of the Act creates a presumption that its omission elsewhere in the Act was done intentionally and purposely. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983). Thus, if Congress saw a need to override explicitly § 2(b) in 1990 and 1993, in order to preempt state authority, it should have used equally explicit language in 1996 if it intended similarly to preempt long-standing state authority over coin rates.

Respondents attach too much significance to the Eighth Circuit's two references in Iowa to § 276 and its single reference to the decision below. FCC Opp. at 10-11; Bell Opp. at 8-9; APCC Opp. at 10-11. The Iowa Court made those references simply to illustrate that, elsewhere in the 1996 Act, Congress had used more direct and precise language to open a gate in the § 2(b) fence, allowing the FCC some intrastate authority. It is unfortunate that the Court used the phrase "intrastate pricing authority" in the same

sentence in which it referenced § 276. Iowa at 797. To the extent the Court inferred that § 276 granted "intrastate pricing authority," it was mistaken. In any event, that misspoken example was merely illustrative, was not part of the Iowa holding, and should not be a factor in this Court's review of Iowa or of this case.

Close examination of the entire Iowa decision indicates that the Eighth Circuit attached the same weight to § 2(b) as this Court did in La. PSC, while the D.C. Circuit did not in this case. Congress alone has the authority to repeal or override § 2(b), and when Congress chooses to override § 2(b), its intent must be shown by "unambiguous" language. Iowa, at 797, citing La. PSC, at 376-77.

Respondents' attempts to distinguish La. PSC from the present case fail. They attach significance to the fact that 47 U.S.C. § 220 ("§ 220"), the critical depreciation statute reviewed in La. PSC, does not refer to "state ratemaking" or to "preemption," whereas § 276 refers to "compensation for intrastate calls" and "preemption of inconsistent state requirements." FCC Opp. at 9-10; Bell Opp. at 8; APCC Opp. at 10, n.9. That distinction is meaningless. Careful review of §§ 220 and 276 reveals their significant similarities concerning intrastate ratemaking. Each section gives the FCC authority over important components of local telecommunications. Both sections exert influence on intrastate regulation, but neither is so direct and explicit as to countermand § 2(b). Section 276 is not sufficient to demonstrate Congress' straightforward and unambiguous intent to pass over or through the § 2(b) fence in order to preempt existing state ratemaking authority.

Even disregarding this point, the language of § 276(c) requires, at most, preemption only of inconsistent state

requirements. There has been no showing by Respondents that continued state authority over coin rates is or will be inconsistent with the FCC's obligation to ensure per call compensation. Congress did not authorize the FCC to set coin rates for local calls.

Petitioners agree with Respondents that review of this case need not be delayed pending review of the Eighth Circuit's Iowa decision. It can be considered before, during, or after that case. That case involves §§ 251 and 252 while this one involves § 276. The Court will presumably use the same principles to determine how large a gate Congress intended § 276 to create in the fence protecting long-standing state payphone regulation. Petitioners strongly agree with the Eighth Circuit's holding that § 2(b)'s restrictions preclude the FCC's assertion of authority over intrastate rates. If the Court concurs and affirms the § 2(b) portion of Iowa, it should also reverse the D.C. Circuit's opinion in Illinois Public Telecommunications Ass'n v. Federal Communications Comm'n, et al., 117 F.3d 555 (D.C. Cir. 1997) as to FCC authority over intrastate local coin rates. The Court's granting of certiorari in Iowa implies that reconciliation of § 2(b) with the jurisdictional parts of the 1996 Act is so essential to U.S. telecommunications law and policy that it warrants resolution at the national level, rather than at the Circuit Court of Appeals level. The issues presented here are of equal importance.

2. Tenth Amendment.

A. Waiver

Respondents' Briefs in Opposition contend that Petitioners waived the Tenth Amendment point. The Respondents recognize that Printz v. U.S., ___ U.S. ___, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("Printz") was decided

shortly before the D.C. Circuit issued its decision on July 1, 1997. Respondents, however, contend that the June 27, 1997, U.S. Supreme Court decision was not significant enough to justify Petitioners raising the Tenth Amendment argument before the D.C. Circuit Court of Appeals on rehearing. Respondents argue that the Petition also relies on New York v. United States, 505 U.S. 144 (1992) ("New York"), and that Printz has added so little to the Tenth Amendment analysis contained in New York that the alleged waiver by Petitioners of their Tenth Amendment arguments (until rehearing) cannot be remedied. FCC Opp, at 12, n.5; APCC Opp. at 13.

In Printz, however, the Court for the first time specifically addressed the question of whether the statutory provisions found flawed in New York can be distinguished from more ministerial state or local functions imposed by federal requirements. The Government argued in Printz that the provisions at issue in New York were found to be in violation of the Tenth Amendment because they placed a "policy making role" on the states. The background checks required under the Brady Act, which were at issue in Printz, simply required state and local law enforcement officials to provide limited, non-policy making assistance in enforcing federal handgun laws. Printz, 117 S. Ct. at 2380.

The Printz Court, however, found, "[e]ven assuming, moreover, that the Brady Act leaves no 'policy making' discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty." Id. at 2381. Therefore, the Court in Printz clearly expanded upon the scope of Tenth Amendment analysis earlier defined by the New York decision. Based on that expansion, the

Petitioners sought review below[3] on Tenth Amendment grounds because the FCC's actions impose similar non-policy making requirements upon the states, contrary to Printz. As a consequence of the FCC's rule, the state regulators are not simply free to devote their resources elsewhere, as intimated by the Federal Respondents. See FERC v. Mississippi, 456 U.S. 742, 787 (1982) ("FERC"). Under 47 C.F.R. § 64.1330, states must administer and fund any public interest payphones.

B. Coercion

The Federal Respondents now contend that the FCC Payphone Order is not coercive, in violation of the Tenth Amendment, because states actually have the choice between regulating in accordance with federal requirements or suffering preemption. They argue that the FCC Payphone Order, CC Docket No. 96-128 (FCC 96-388), Report and Order (released September 20, 1996) 61 Fed Reg. 65,341 (October 7, 1996) (also found at 11 F.C.C.R. 20,541) ("Payphone Order") at ¶¶ 285-286 "left it to each state commission to determine, as a threshold matter, 'whether it needs to take measures to ensure that [public interest] payphones will continue to exist.'" FCC Opp. at 14, citing FERC, 456 U.S. 742, 759-70 (1982) and Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289-93 (1981) ("Hodel"). See, APCC Opp. at 14 (arguing no Tenth Amendment question is presented because the states have the option to "withdraw entirely from the regulatory field and leave the subject to preemptive regulations"). See also Bell Opp. at 10-11.

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[3] Petitioners diligently filed petitions for rehearing based on Printz with the D.C. Circuit Court of Appeals as soon as Petitioners became aware of the Printz decision. (Petitioners' App. 90 and App. 101).

The problem presented by the FCC Payphone Order and not recognized by the Respondents is that language used in the text of the Payphone Order, suggesting that the states may have an option as to whether to regulate in accordance with the Payphone Order, does not relieve states from complying with the adopted rule. The actual rule adopted by the FCC at 47 C.F.R. § 64.1330 is quite explicit as to what "each state" as a sovereign state must do. Among other things, that rule provides "each state must" review their payphone rules for compliance with the FCC Order regarding market entry and exit barriers, review their regulations for compliance with the FCC Payphone Order respecting access to certain emergency calls, and complete a compliance review, establishing and funding public interest payphones no later than September 20, 1998. § 64.1330(a), (b), and (c). Moreover, rather than simply providing for preemption of state action or inaction, the FCC has undertaken to grant itself authority to compel state compliance with these regulations. FCC Payphone Order ¶ 286. Arguably, the intrusion on state authority resulting from the FCC Payphone rule does not rise to the level of coercion found improper in New York; however, it certainly equals or exceeds the degree of intrusion found impermissible in Printz. The FCC rule invokes to the same degree contemplated by Printz "directly compelling" concerns about federal regulation first identified in FERC, 456 U.S. at 765 and Hodel, 452 U.S. at 288.

The Federal Respondents also argue that the FCC Payphone Order only "requires state commissions to consider, and adhere to, federal law when addressing the subject of public interest payphones." FCC Opp. at 15. See also Bell Opp. at 11. While it is clear that the federal government may require states to comply with federal law

through regulation of "private activities affecting interstate commerce," it is an entirely different matter when the federal government regulates state activities per se. Hodel, 452 U.S. at 291. In the present case, the FCC has not sought to control the "private activities" of payphone providers, which would be permitted under Tenth Amendment jurisprudence, so much as to direct state regulatory activities regarding payphones, which is prohibited under New York and Printz.

Conclusion

The petition should be granted to resolve (1) a compelling national question of whether Congress intended to preempt state regulation of payphone rates and (2) a constitutional question of the authority of the FCC to mandate and direct long-standing state regulatory activities.

Respectfully submitted,

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